



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Texstar, Inc.
File: B-239905
Date: October 9, 1990

Gretchen A. Benolken, Esq., Doke & Riley, for the protester.
Cindy Roberts for Llamas Plastics Inc., an interested party.
Charles J. McManus, Esq., Department of the Navy, for the agency.

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DIGEST

1. Protest that pre-award source approval was not required and thus that agency improperly rejected protester's proposal because protester was not an approved source is denied where the solicitation clearly contemplates that the award would be made to an approved source.

2. Protest that agency improperly rejected protester's proposal because protester was not an approved source is denied where the agency's needs became urgent and the agency reasonably determined that it could not delay the procurement until the protester received source approval.

DECISION

Texstar, Inc. protests the award of a contract to Llamas Plastics Inc. under request for proposals (RFP) No. N00383-89-R-2081, issued by the Department of the Navy for windscreens for the T-2 aircraft.

We deny the protest.

BACKGROUND

The windscreens, which are installed forward of the aircraft cockpit, are designed to fit the aerodynamic contours of the T-2. They are considered flight critical items because a failure of the screen during operation of the aircraft could significantly endanger flight safety. Consequently, only sources that have obtained source approval from the Naval

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Air Systems Command engineering division are considered eligible to provide the windscreens.

On May 18, 1989, the agency issued two RFPs, one for left side windscreens for the aircraft and one for right side windscreens. The RFPs were issued to Llamas and Rockwell International Corp., the only two approved sources for the windscreens, on the basis that these were the only responsible sources available to provide the windscreens and no other type of supplies would satisfy the Navy's requirements. The RFPs required delivery of two first article test units within 225 days after the date of contract award and production units within 565 days after the date of contract award.

After the solicitations were issued, several firms which were not approved sources expressed an interest in submitting proposals. In response, the contracting officer investigated whether technical drawings of the items were available and learned that the available data were sufficient to permit firms experienced in the manufacture of similar aircraft parts to seek source approval.

Subsequently, the requirements were consolidated into one solicitation, which was synopsized in the Commerce Business Daily (CBD) on August 31. The synopsis notified potential offerors that the windscreen is a flight critical item that requires source approval prior to award. The synopsis further advised that the award would not necessarily be delayed pending approval of a new source and that if evaluation of a source approval request could not be processed in time to meet the logistics support requirements, award would be made to a currently approved source.

On February 26, 1990, amendment No. 2 to the RFP was issued, which, among other things, added the following clause:

"The time required for approval of a new supplier is often such that award cannot be delayed pending approval of a new source. Any offeror not currently approved by the Navy would be required to submit data showing prior satisfactory production of the same or similar items, test data indicating that the offeror's product can meet service operating requirements or other pertinent data concerning the offeror's qualifications to produce the required item, in order to be considered for possible source approval. A complete description of source approval procedures

to be followed is contained in ASO's 'Source Approval Information' booklet. . . ."

"Please note that award of this requirement may continue based on fleet logistics support needs. If evaluation of a source approval request, submitted hereunder, cannot be processed in time to meet logistics support requirements, or if potential acquisition savings do not justify such evaluation, award may be made to a currently approved source."

By April 9, the closing date for the receipt of initial offers established by amendment No. 3, Llamas and three unapproved services, including Texstar, submitted proposals. Earlier, on April 4, Texstar had submitted a source approval request and the required documentation, which was forwarded for approval. On April 23, the contracting officer was informed by the agency's source development group that it would take approximately 180 days to review the source approval request and grant Texstar source approval status. The contracting officer then determined that given projected fleet support requirements, the need for the windscreens had become urgent and award could not be delayed until Texstar obtained source approval. On May 23, the Navy informed Texstar that its proposal had been rejected because fleet support needs could not be delayed while Texstar's source approval request was undergoing evaluation. The contract was awarded to Llamas on the same date.

SOURCE APPROVAL REQUIREMENT

Texstar complains that the RFP did not require pre-award source approval and thus the failure to be an approved source was not a valid basis on which to reject Texstar's proposal. To the contrary, argues Texstar, amendment No. 2 anticipates award to a nonapproved source and lists three alternative means for a nonapproved source to become eligible for award: (1) prior satisfactory performance on the same or a similar item; (2) submission of test data indicating the offeror can meet service operating requirements; and (3) provision of other pertinent data concerning qualifications to produce the required item. Texstar further asserts that since the solicitation does not require pre-award source approval, the agency cannot rely on the CBD notice, which did specifically refer to source approval, to justify requiring award to an approved source. In fact, reasons Texstar, since the CBD notice shows that the Navy knows how to clearly state that pre-award approval is required and since the Navy included the language of the CBD notice in amendment No. 2, with the exception of the

reference to pre-award source approval, the change from the CBD notice to the solicitation clearly demonstrates that the Navy deliberately chose to change the terms of the solicitation so that pre-award approval was not required.

Finally, Texstar notes that the Navy states it will take 180 days for Texstar to obtain source approval. Texstar complains that because 180 days did not pass between February 26, 1990, the date amendment No. 2 was issued, and May 23, the date Texstar was notified of award to Llamas, the Navy violated 10 U.S.C. § 2319 (1988), because it failed to give Texstar an adequate opportunity to qualify for award.

In response, the Navy asserts that Texstar is charged with constructive notice from the CBD synopsis that pre-award source approval is required. In any case, argues the Navy, while amendment No. 2 did not explicitly state that pre-award source approval is required, the first sentence of the second paragraph of amendment No. 2--"the time required for approval of a new supplier is often such that award cannot be delayed pending approval of a new source"--read in conjunction with the last sentence--"if evaluation of a source approval request, submitted hereunder, cannot be processed in time to meet logistics support requirements . . . award may be made to a currently approved source"--clearly indicates that only an approved source could receive the contract award.

We disagree with Texstar's assertion that the solicitation contemplates award to a nonapproved source; rather, we find that the solicitation provides for award to a source that is not approved at the time it submits its proposal, but receives approval before the contract is awarded. The last sentence of the second paragraph of amendment No. 2--"if evaluation of a source approval request, submitted hereunder, cannot be processed in time to meet logistics support requirements . . . award may be made to a currently approved source"--clearly indicates that a nonapproved source might submit a proposal and a source approval request, but would not receive an award unless it received source approval before the award was made. Further, the language of amendment No. 2 which Texstar cites as indicating that a contractor can qualify for award without obtaining source approval--"any offeror not currently approved by the Navy would be required to submit data showing prior satisfactory production of the same or similar item, test data indicating that the offeror's product can meet service operating requirements, or other pertinent data concerning the offeror's qualifications to produce the required item"--is qualified by the phrase, "in

order to be considered for possible source approval." (Emphasis added.) Thus, the three alternatives are listed only as possible means of obtaining source approval, not as means to become eligible for award without obtaining source approval.

Finally, insofar as Texstar argues that the Navy violated the statutory requirement to give Texstar an adequate opportunity to become qualified, under 10 U.S.C. § 2319(c)(3) a potential offeror may not be denied the opportunity to submit and have considered an offeror for a contract if the offeror can demonstrate that its product meets or can meet the approval standards before the date for award. The agency, however, is not required to delay a procurement in order to provide a potential offeror an opportunity to demonstrate its ability to become approved. 10 U.S.C. § 2319(c)(4). Thus, here, where the Navy determined that it needed to make an immediate award because its requirements were urgent, the Navy's failure to delay the procurement by 180 days while Texstar underwent source approval was not a violation of the statute. See Aircraft Instruments Co., B-233609, Mar. 6, 1989, 89-1 CPD ¶ 241. In this regard, we note that while the procurement with the source approval requirement was synopsisized in the CBD on August 31, 1989, Texstar did not submit a source approval request until April 1990. Texstar therefore substantially contributed to its failure to obtain source approval in time for the award. See Kitco, Inc., B-232363, Dec. 5, 1988, 88-2 CPD ¶ 559.

URGENCY DETERMINATION

Texstar asserts that even if pre-award source approval was required by the solicitation, the Navy was not justified in awarding the contract to Llamas on the basis of urgency.

The Navy states that the urgency which required award to an approved source did not exist at the time the initial solicitations were issued but arose as a result of the delays which followed the Navy's attempt to promote competition. The Navy reports that at the time of award the contracting officer was advised that there was an urgent need for the windscreens; specifically, the current stock was depleted, there was an increase in demand because the T-2s were undergoing repair, and work stoppages on the overhaul of T-2 aircraft would occur within 4 months of the date the contract was awarded. No relief was expected until deliveries were made under the current contract, 565 days from the date the contract was awarded, at which time there would be a substantial deficit of windscreens.

Concerning the left side windscreen, as of the quarter ending June 30, there would be a deficit of seven windscreens. In addition, there were six quarters until December 1991, when delivery under the contract was expected, and the Navy had a requirement for 15 left side windscreens per quarter for a total of 90. Thus, by December 1991, there would be a deficit of 97 left side windscreens. If the procurement were delayed by an additional 180 days (or 2 quarters) while Texstar was obtaining source approval, this deficit would increase to 127 left side windscreens.

Concerning the right side windscreen, as of the quarter ending June 30, there was a deficit of 41 windscreens. In addition, there was a requirement for 16 windscreens per quarter so that by December 31 there would be a deficit of 137 windscreens (6 quarters times 16 per quarter plus 41). If the procurement were delayed by an additional 180 days while Texstar obtained source approval, the deficit would increase to 169 right side windscreens.

Texstar first argues that the fact that the Navy never executed a justification and approval to limit competition on the basis of urgency shows that the Navy did not have an urgent need for the windscreens. Texstar further argues that any urgency that does exist is the result of the Navy's decision not to require delivery until 565 days after contract award; Texstar asserts that it could produce the first production unit within 6 weeks after first article approval. Texstar also argues that if there is an urgent need for the windscreens, the Navy should only have awarded a contract for the minimum number of windscreens that are urgently needed.

In our view, the record supports the Navy's finding of urgency. First, while, as Texstar argues, the Navy did not execute a justification and approval to award the contract on the basis of urgency, we find that the Navy's failure to do so does not indicate that no urgency existed. When a procuring agency awards a contract without providing for full and open competition, the contracting officer must execute a written justification of its reasons for doing so. Federal Acquisition Regulation (FAR) § 6.303.1. The contracting officer also must obtain approval for the acquisition from the appropriate agency official. FAR §§ 6.303-1, 6.304. Where, as here, the contract is for an amount between \$1 million and \$10 million, the justification must be approved by the head of the procuring agency or his designee. FAR § 6.304(a)(3). When the contract is for an amount between \$100,000 and \$1 million the justification

must be approved by the competition advocate.
FAR § 6.304(a)(2).

The Navy initially executed two justifications--one for the left side and one for the right side procurements--on the basis that only the approved sources had the necessary data to meet the agency's needs. These justifications were approved by the competition advocate because when the requirement was issued as two solicitations, it was anticipated that the cost of each would be less than \$1 million. When the need later became urgent, the contracting officer did not execute a new justification; instead, he annotated the old justification to note that Texstar could not be awarded the contract because it was not yet an approved source. This annotated justification was then signed again by the competition advocate. While we agree that a new justification should have been executed and submitted for approval at a level above the competition advocate, we do not think that this is a sufficient basis on which to sustain the protest. The Navy did attempt to comply with the requirement by annotating the old justification, and, in any case, when the basis for limiting competition is urgent, the justification can be executed after award, although it should be done within a reasonable time. Allied Signal, Inc., Garrett Research, B-228591, Feb. 25, 1988, 88-1 CPD ¶ 193. Accordingly, the Navy should now execute a proper justification.

To the extent that Texstar argues that the Navy should only procure the minimum number of windscreens required to meet its urgent needs, the Navy reports that it needs all the windscreens it has ordered. Given the projected deficit of windscreens, we have no basis on which to question the Navy's conclusion in this regard. We do expect, however, that the Navy will continue to process Texstar's source approval request and, if Texstar obtains source approval, not exercise the option in Llamas' contract.

Finally, even if, as Texstar suggests, the Navy shortened the time for the delivery of production units, the Navy would not be required to delay procuring the windscreens until Texstar received source approval. The Navy still would have a deficit of windscreens and would require 180 days to grant Texstar source approval status. Thus, it would still take Texstar 180 days longer than the approved source before it could deliver production units.

TEXSTAR'S ABILITY TO MEET DELIVERY REQUIREMENTS

Texstar argues that even if it properly was required to obtain source approval, it could meet the Navy's delivery

schedule. First, argues Texstar, according to Department of Defense Federal Acquisition Regulation Supplement (DFARS) Supplement No. 6, source approval should be completed in 60 days, not 180. Thus, reasons Texstar, it should have received approval by June 3, within 60 days after April 4, the date it submitted its source approval request. Texstar further notes that it submitted a prior source approval request in 1987 which was denied because of incomplete data. Texstar notes that the agency did a site survey in conjunction with the prior approval request and issued a trip report finding Texstar qualified and that this should shorten the time for it to become an approved source now.

Finally, Texstar argues there is no basis for the Navy to conclude that an award to Texstar would delay the procurement by 180 days. Texstar asserts that the deliverable periods under the solicitation--225 days for delivery of first article units and 565 days for delivery of production units--could run concurrently with the 180-day source approval period. According to Texstar, it could deliver the first article within 225 days after contract award, or 45 days after source approval was granted. As an alternative, Texstar argues that the first article testing and the source approval requirements are independent and thus that it could deliver the first article units and then obtain source approval.

We find that the Navy reasonably decided that Texstar could not obtain source approval in time to meet the delivery schedule. First, contrary to Texstar's contention, DFARS Supplement No. 6, which establishes the Department of Defense Spare Parts Breakout Program and provides uniform policies and procedures for management of the program, does not require that source approval requests be completed in 60 days; rather, it simply provides as follows:

"A firm must clearly demonstrate, normally at its own expense, that it can satisfy the Government's requirements. The Government shall make a vigorous effort to expedite its evaluation of such demonstration and to furnish a decision to the demonstrating firm within a reasonable period of time. If a resolution cannot be made within 60 days, the offeror must be advised of the status of the request and be provided with a good faith estimate of the date the evaluation will be completed."

Thus, the Navy was not required to grant Texstar source approval in 60 days. As required by DFARS Supplement

No. 6, the Navy did give Texstar notice of the date when it expected the evaluation to be completed.

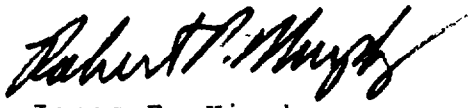
Second, the subject of the trip report on which Texstar relies was a site survey that the Navy conducted of Texstar's facilities in October 1988. The Navy explains that the purpose of a site survey is to determine if the surveyed vendor is qualified to become a qualified source, not to grant a vendor source approval. The vendor still must submit a source approval request and obtain engineering source approval. Thus, the trip report did not give Texstar approved source status, but only established that Texstar was qualified to become an approved source.

Third, we see no basis to conclude that because Texstar had previously submitted a source approval request, it now should take the Navy less than 180 days to approve Texstar. Texstar's initial source approval request, submitted in March 1987, was not considered because Texstar did not submit a complete package. Accordingly, the fact that Texstar submitted that request will not speed up the current source approval request.

Finally, insofar as Texstar asserts that it could provide a first article unit within the required 225 days after contract award even if it took the Navy 180 days to grant Texstar source approval status, or that it could submit a first article unit before it obtains source approval, the Navy is under no obligation to accept the risk that Texstar will obtain source approval and deliver the windscreens on time. Howmet Corp., B-232421, Nov. 28, 1988, 88-2 CPD ¶ 520.

Given that the record supports the Navy's urgent need for the windscreens and its determination that Texstar could not meet the required delivery schedule due to the time and risk involved in obtaining source approval, we see no basis on which to question the award to Llamas, the only approved source that submitted a proposal.

The protest is denied.


for James F. Hinchman
General Counsel